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In The

Supreme Court of the United States

October Term, 1989

FRASIEL L. HUGHEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

May a defendant, who pleads guilty to a single offense which is neither a conspiracy nor a scheme, be required to make restitution under the Victim and Witness Protection Act for criminal acts outside the offense of conviction, where the defendant neither admits responsibility for those other criminal acts nor consents to an order of restitution outside the count of conviction?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.; J.A. 86-110) is reported at 877 F.2d 1256 (5th Cir. 1989). The memorandum order of the district court (J.A. 82-85) is not reported.

JURISDICTION

The decision of the court of appeals (Pet. App.; J.A. 86-110) was announced on July 27, 1989. The petition for certiorari was filed on September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATUTORY PROVISIONS INVOLVED[1]

Title 18 U.S.C. § 3579(a)(1) and § 3580(a) and (d) provided, at the time of imposition of sentence upon Petitioner:

---

[1] The full text of 18 U.S.C. §§ 3579, Order of restitution, and 3580, Procedure for issuing order of restitution, as in effect on the date of Petitioner's sentencing, are set out in the Appendix to this Brief at A-1–A-6.

§ 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

. . . .

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

STATEMENT

Petitioner Frasiel L. Hughey (hereinafter Petitioner) was charged by superseding indictment in the Western District of Texas with three counts of mail theft in violation of 18 U.S.C. § 1709 and with three counts of fraudulent use of a credit card, in violation of 18 U.S.C. § 1029(a)(2).[2] (J.A. 3-6) The parties negotiated a settlement of the case whereby, in exchange for Petitioner's plea of guilty to Count Four of the indictment, Respondent agreed to dismiss the remaining counts, and further agreed that it would not prosecute Petitioner for any other related offenses in the Western District of Texas. (J.A. 7-8) Count Four of the indictment charged Petitioner with the fraudulent use of a credit card issued by MBank to one Hershey Godfrey, in an amount in excess of $1,000.[3] (J.A. 4-5)

---

[2] This latter statute, under which Petitioner eventually pled guilty, provides in pertinent part:

> (a) Whoever—
>
> . . . .
>
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;
>
> . . . .
>
> shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

18 U.S.C. § 1029(a)(2).

[3] Count Four of the superseding indictment read:

> That on or about October 18, 1985, in the Western District of Texas, and elsewhere, Defendant,

(Continued on following page)

The parties had no agreement as to any aspect of the sentence. The possibility of restitution was never discussed. (J.A. 7-8) The first mention of restitution occurred at the plea proceeding, during which the district court advised Petitioner in general terms that "in addition to any term of imprisonment or fine imposed by the Court *for the offense to which you are pleading guilty*, you may be required to make restitution in the form of money for any property loss suffered by the victim *as a result of this offense*." (J.A. 9) (Emphasis added.) Petitioner was never advised prior to his plea that he could be ordered to pay restitution for MBank's losses over and above the count of conviction.

During its proffer of the factual basis in support of Petitioner's plea, Respondent stated to the court that Petitioner, while employed by the United States Postal Service, had stolen the Godfrey credit card, as described in Count Four of the indictment, "as well as a number of other cards." (J.A. 10) Petitioner promptly informed the court that, in pleading guilty, he was not acknowledging or responding to any allegations except those which pertained to the Godfrey count. (J.A. 11) Petitioner restated this position at every pertinent point in the proceedings.

(Continued from previous page)

FRASIEL L. HUGHEY,

did knowingly and with intent to defraud use an unauthorized access device, to-wit: MBank Mastercard Credit Card Number 5417-1260-0013-9427, issued to Hershey Godfrey, 504 Cypress, Crosby, Texas 77532, and by such conduct did obtain things of value aggregating more than $1,000.00, such offense affecting interstate commerce, in violation of Title 18, United States Code, Section 1029(a)(2).

(J.A. 29, 46, 48) Respondent never interposed any objection to Petitioner's express limitation of liability.

After his plea, but prior to sentencing, Petitioner was notified by the Probation Office that he might be required to make restitution to MBank in the amount of $147,646.89. (J.A. 12) Pursuant to local procedure, Petitioner filed timely, written objections to the proposed restitutory figure, but offered in open court to make restitution in the amount of $10,412—the sum representing MBank's total losses as a consequence of Petitioner's fraudulent use of the Godfrey credit card, as described in the count of conviction. (J.A. 12-14, 32, 35, 44)

At the sentencing hearing, Respondent took the position that Petitioner owed MBank $90,431 in restitution, a revised sum which represented MBank's total losses from the unauthorized use of 21 of its credit cards issued to Godfrey and others. (J.A. 41-42, 44, 49) In an effort to establish Petitioner's liability for MBank's losses outside the offense of conviction, Respondent introduced a written stipulation in evidence at sentencing. (J.A. 53-57) As expressly stated in the document, however, the stipulation set forth expected testimony only and did not constitute a stipulation of fact. (J.A. 57) With this proviso, Petitioner did not object to the introduction of the stipulation at sentencing. (J.A. 29)

In substance, the stipulation presented the following expected testimony:

1) One Clarence Thompson told Secret Service Agent Scott Jones that Petitioner gave Thompson 15 VISA or Mastercharge cards issued by MBank, and admitted getting them from the post office where he worked.

2) A business person identified Petitioner to a Postal Inspector as the individual who had used an MBank Mastercharge card issued to James R. Windom.

3) Petitioner's postal supervisor would testify that Petitioner had access to MBank's post office box in connection with his duties.

4) An MBank investigator would testify that:,

a) Thomas Beatty said Petitioner provided him with three MBank charge cards issued to others.

b) Business persons identified Petitioner in possession of two MBank cards issued to others.

c) All of those listed cardholders reported that they had moved; that they had not received their cards; and that they were billed for unauthorized charges.

d) The envelopes sending out those charge cards to cardholders were marked "Do Not Forward – Return to Sender" at the MBank postal box to which Petitioner had access.

e) The total loss to MBank on those cards was $90,431. (J.A. 53-57)

In response, Petitioner reemphasized in open court that the stipulation was solely as to testimony, not facts, and that he was not making any admission as to any fact contained therein. (J.A. 29) Further, Petitioner interposed his objections to any restitutory order in excess of the $10,412 which could be attributed to his use of the Godfrey credit card on the ground that such an order would

exceed the court's authority under the Victim and Witness Protection Act ("VWPA") and would not fairly take into account his ability to pay. (J.A. 32, 44, 47, 74-75)

The district court sentenced Petitioner to a term of eight years confinement in the custody of the Attorney General, and ordered him to pay restitution to MBank in the amount of $90,431 during the term of his parole. (J.A. 77-78)

Petitioner challenged the legality of the court's restitution order in a timely "Motion to Reduce Sentence and to Correct an Illegal Sentence" filed under authority of Rule 35, F.R.Crim.P. (J.A. 80-81) The district court's denial of that motion, (J.A. 82-85), was affirmed on appeal by the Fifth Circuit Court of Appeals. (Pet. App.; J.A. 86-110) In so doing, the court of appeals concluded that the VWPA permits a restitution order beyond the amount involved in the offense of conviction when "there is a significant connection between the crime of conviction and similar actions justifying restitution." *United States v. Hughey*, 877 F.2d 1256, 1264 (5th Cir. 1989) (J.A. 104). The court found that nexus to be strong in Petitioner's case because it found that "the restitution order involved the same defendant, the same victim, and multiple identical criminal offenses." 877 F.2d at 1264 (J.A. 105)

This Court granted certiorari on January 8, 1990. (J.A. 111)

SUMMARY OF ARGUMENT

Petitioner will show that the restitution provision of the Victim and Witness Protection Act of 1982 ("VWPA")

is limited to losses flowing from the offense of conviction. Petitioner's argument is divided into three parts. Petitioner will show first that examination of the clear language of the statute, the initial step in applying a penal provision, requires limitation of restitution to a victim of the offense of conviction. If, however, the Court should find any ambiguity which warrants interpretation, Petitioner will show that the customary rules of statutory interpretation demonstrate conclusively the correctness of the restrictive interpretation. Finally, Petitioner will show that the limited exceptions to restrictive application of the restitution statute developed by the courts of appeals do not apply to this case, because none are even arguably present, and the court below did not rely upon them.

I

Where the meaning of a statute is plain from its clear and unambiguous language, the duty of the courts is to enforce it as written. As this is such a case, this Court should declare that the VWPA on its face permits restitution only to a victim of the offense of conviction.

A. Absent a clearly expressed legislative intent to the contrary, statutory terms are understood to carry their ordinary meaning, and the unambiguous language of a statute is conclusive as to its meaning. Since the clear language of the VWPA limits restitution to the offense of conviction, this Court need not resort to the rules of statutory construction.

B. The operative language of § 3579(a)(1) is: "The court, when sentencing a defendant convicted of an

offense . . . may order . . . that the defendant make restitution to any victim of such offense." By ordinary rules of sentence construction, the term "such offense" must be taken to refer back to the antecedent phrase "convicted of an offense." This plain meaning is confirmed by reference to other portions of the restitution provisions, which refer consistently to "the offense," in contexts which cannot mean anything other than the offense of conviction. This is so because of both the plain meaning, and the assumption that identical words used in different parts of the same act have the same meaning.

The court of appeals recognized that these statutory provisions by themselves point to a limitation of restitution to the offense of conviction. The lower court went on, however, to read other portions of the VWPA so as to create an ambiguity, which it resolved in favor of an expansive interpretation of this criminal statute. First, the court of appeals examined § 3580(a), which directs the sentencing court to consider both the victim's loss and specified factors bearing on the defendant's ability to pay restitution, followed by a catch-all phrase, "such other factors as the court deems appropriate." Rather than restrict this general phrase to the character of the more specific factors which precede it, the lower court erroneously took it to mean that Congress had intended to expand the restitutory authority beyond the count of conviction. Next, the lower court found some redundancy of language in § 3580(e), which estops the defendant from denying the essential allegations of the offense of conviction in a subsequent civil proceeding brought by the victim. The language in question is easily understood as related to the specific nature of estoppel, and in service of

a different purpose than § 3579(a)(1), which establishes restitutory liability. It provides no basis for finding that Congress intended a major transformation of the law of restitution as a penal sanction. Finally, the court of appeals took the fact that Congress did not perpetuate in the VWPA the precise phrasing of the Federal Probation Act ("FPA"), restricting restitution to "the offense for which conviction was had," to mean that the restriction had been abandoned. This Court has recognized, however, that a minor change in wording, without more, cannot be taken to effect a major change in the meaning of a statute.

In sum, the restitutory provisions of the VWPA admit of only one meaning—that Petitioner may be ordered to make restitution only to a victim of the offense of conviction. As a court has no inherent power to order a defendant to pay restitution, the judgment in this case exceeded statutory authority and must be reversed.

II

If this Court should find that there is any ambiguity in the restitution provisions of the VWPA, then reference to traditional rules of statutory construction compels the conclusion that restitution is limited to the offense of conviction.

A. Where statutory language leaves an ambiguity, it is proper to look to the legislative history to aid in construction of the statute. The most authoritative legislative history of both the original enactment of the VWPA and the 1986 clarifying amendment confirms that Congress

intended that restitution be limited to losses sustained by a victim of the offense of conviction.

1. The Senate Report on the VWPA reflected an awareness of language of the FPA limiting restitution to the offense of conviction. It went on to identify five major problems of existing law, none of which was limitation to the offense of conviction. The Report then explained § 3579(a) by saying that it expanded current law by authorizing an order of restitution independent of a condition of probation. The Report nowhere identifies expansion of the restitution authority beyond the offense of conviction as a purpose of the bill, which would certainly be expected if so radical a change had been intended.

2. A House Report authoritatively explained the 1986 clarifying amendment of § 3579(a)(1), which changed the phrase "any victim of *the* offense" to "any victim of *such* offense." (Emphasis added.) Noting questions which had been raised in law journals as to the meaning of the phrase, the House Judiciary Committee declared in language as direct and explicit as can be imagined, that the reference to "the offense" in § 3579(a)(1) was to the offense for which the defendant has been convicted and is being sentenced. The Committee went on to say that the reference would be changed from "the offense" to "such offense" because the change in phraseology, even though unnecessary because it would not alter the meaning of the provision, could do no harm. The Committee emphasized that the change did not alter the meaning of the provision. There is no indication that the court of appeals considered this highly pertinent legislative statement, which is conclusive as to the meaning of the amended statute under which Petitioner

was sentenced. Where the legislative intent is so plainly expressed, and consistent with the clear statutory language, Petitioner's right to relief is clear.

B. Any ambiguity in the restitution portion of the VWPA must be resolved by narrow construction of the statute because restitution is a penal sanction. The punitive nature of a restitution order was both understood and intended by the Congress, and this Court has also recognized that a restitution order is punishment. The court of appeals violated the rule of lenity, which aids in the construction of doubtful criminal statutes, by adopting an interpretation which increases rather than limits the punishment of restitution.

C. Finally, a narrow construction of the restitution power is compelled because the expansive interpretation threatens constitutional problems which otherwise would not arise. Ignoring this precept, the court of appeals enunciated a "significant connection" test which represents a radical departure from accepted notions of criminal liability. The restitution provisions must be limited to the offense of conviction in order to avoid impairment of the constitutional right to due process of law.

III

The circuit courts of appeals have identified certain limited exceptions to the statutory restriction of restitution to the offense of conviction. They include (1) cases where a defendant is convicted of an offense which is conspiracy, or which has as an element a scheme to defraud, encompassing uncharged losses; (2) cases where a defendant expressly admits, or does not dispute that he

committed the collateral criminal conduct; and (3) cases where a defendant agrees, as part of the plea agreement or during the sentencing hearing, to make restitution beyond the offense of conviction. This Court need not, in this case, address the correctness of those exceptions because none of them are even arguably present in this case, and because the court below did not rely upon them in fashioning its "significant connection" rule.

ARGUMENT

I. THE LIMITATION OF RESTITUTION TO THE COUNT OF CONVICTION IS CLEAR FROM THE PLAIN LANGUAGE OF THE STATUTE.

A. Legal Principles.

This Court has ruled that, in the absence of a clearly expressed legislative intent to the contrary, the unambiguous language of a statute must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580 (1981). *See also Ford Motor Credit Company v. Cenance*, 452 U.S. 155, 158 n.3 (1981). Accordingly, where resolution of a question of federal law turns on a statute and the intent of Congress, courts must look first to the language of the statute itself, and they will only look to legislative history if the statutory language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500, 1504 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). Should this Court find that the language of the statute limits restitution to the offense of conviction, then "the rules which are to aid doubtful

meanings need no discussion." *Caminetti v. United States*, 242 U.S. 470, 485-486 (1917).

B. The Language of the Statute is Clear and Unambiguous.

Petitioner submits that this Court's inquiry need go no farther than the face of the statute itself, which plainly states that the amount of restitution is limited to the loss sustained as a result of the offense for which the defendant has been convicted and is being sentenced. The starting point is § 3579(a)(1), which provided on the date of Petitioner's sentencing that

> The court, when sentencing a defendant convicted of an offense . . . may order . . . that the defendant make restitution to any victim of *such* offense.

18 U.S.C. § 3579(a)(1), as amended by P.L. No. 99-646, § 79(a), 100 Stat. 3619 (Nov. 10, 1986) (emphasis added). As may be seen, § 3579(a)(1) uses the word "offense" twice—it first refers to "an offense" for which the defendant has been "convicted" and is undergoing "sentencing," and it immediately thereafter refers to "such offense." In this context, the term "such offense" necessarily refers back to the single offense of which the defendant has been convicted and is being sentenced. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 25 n.8 (1982) (holding that the term "such person" clearly "refers back" to the prior use of the term "persons" in the same sentence).

Section 3579(a)(1) therefore unambiguously answers two questions. It makes clear, first, that the term

"offense," as used in the VWPA, means the offense of conviction. And § 3579(a)(1) also states clearly that the defendant may be ordered to make restitution only to a victim of the offense of conviction—in this case, to MBank.

We acknowledge, however, that § 3579(a)(1) does not necessarily answer the question of *how much* restitution a defendant may be ordered to pay to the victim of the offense of conviction.[4]. But that question is clearly and unambiguously answered in Petitioner's favor by § 3580(a) and (d). Section 3580(a) states in pertinent part that

> The court, in determining . . . the amount of such restitution, shall consider the amount of the loss sustained by any victim *as a result of the offense.*

(Emphasis added.) Likewise, § 3580(d) declares in relevant part that

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by the victim *as a result of the offense* shall be on the attorney for the Government.

(Emphasis added.) Accordingly, § 3580(a) and (d) both unambiguously limit the amount of restitution to the loss

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[4] It should be noted, however, that § 3579(a)(1)'s limit of restitution to victims of the offense of conviction necessarily means that, where the other alleged offenses involved different victims, restitution is limited to the offense of conviction. Here § 3579(a)(1) does not by itself resolve this case solely because MBank was also the victim of the other alleged offenses.

sustained by the victim "as a result of the offense." Moreover, those provisions use the word "offense" in the singular and must necessarily be read to refer back to the "offense" defined in § 3579(a)(1)—that is, as shown above, the offense of conviction. That is so for two reasons, first as a matter of giving the term its ordinary and obvious meaning, and second, because "[t]he normal rule of statutory construction assumes that ' "identical words used in different parts of the same act are intended to have the same meaning." ' " *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (citations omitted); *see also Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 238-39 (1986); *Morrison-Knudsen Constr. Co. v. Director, OCWP*, 461 U.S. 624, 633 (1983).[5]

The court of appeals recognized that these statutory provisions "by themselves admittedly point" to a limitation of restitution to the offense of conviction. 877 F.2d at 1259 (J.A. 93). But the court purported to find ambiguity in two other provisions. The first is the final phrase of § 3580(a), which states that, in determining whether to order restitution and, if so, in what amount, the sentencing court may consider "such other factors as the court deems appropriate." The court of appeals without explanation found it "obvious" that this authorized restitution in amounts greater than the offense of conviction. But that conclusion is neither "obvious" nor even correct. To

[5] This plain reading is confirmed by § 3579(b), which provides that "in the case of *an offense* resulting in damage to or loss or destruction of property of a victim of *the offense*" the order may require the defendant to "return *the property* to the owner of the property . . . ." 18 U.S.C. § 3579(b) (emphasis added).

the contrary, that phrase on its face is a catch-all provision, in a subsection directing the court to consider both the victim's loss and specified factors bearing upon the defendant's ability to pay. Such a general phrase would, in the absence of express Congressional intent to the contrary, be read to apply to factors of the same character as the more specific phrases which precede it. *See Gooch v. United States*, 297 U.S. 124, 128 (1936). It certainly cannot be construed to override the earlier, express terms of §§ 3579(a)(1) and 3580(a) that limit the amount of restitution to loss caused by the offense of conviction.

Next, the court of appeals found potential surplusage in the words "involving the act" in the collateral estoppel provision of the Act, § 3580(e),[6] because Congress could have provided for collateral estoppel based on "an offense giving rise to restitution" rather than "an offense involving the act giving rise to restitution." 877 F.2d at 1260 (J.A. 93-94). This too is an erroneous conclusion. First, it is more reasonable to conclude that Congress inserted the phrase "involving the act" because collateral estoppel applies to identifiable ultimate facts, *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), and not to statutory offenses. Secondly, § 3580(e) has a different purpose than the restitutory provisions.

[6] Title 18 U.S.C. § 3580(e) provides:

> (e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

Finally, the court of appeals took the fact that Congress did not perpetuate in the VWPA the precise language of the FPA restricting restitution to "the offense for which conviction was had," to mean the restriction had been abandoned. 877 F.2d at 1260 (J.A. 94). This, too, is insufficient to overcome the clear import of the statute, which achieves the same effect in more concise language. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 489 n.8 (1985) ("we cannot view this minor departure in wording, without more, to indicate a fundamental departure in meaning").

In sum, §§ 3579(a)(1) and 3580(a) and (d) unambiguously permit only one interpretation—that the defendant may be ordered to make restitution only with respect to the offense of conviction. There is no federal common law of crimes. "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms." *Todd v. United States*, 158 U.S. 278, 282 (1895); *United States v. Casamento*, 887 F.2d 1141, 1177 (2d Cir. 1989) ("a federal court has no inherent power to order a defendant to pay restitution"). In this case, therefore, the district court had no authority to order defendant to make restitution for alleged offenses other than his fraudulent use of a single credit card issued to Hershey Godfrey. The Court need go no farther, and should therefore reverse.

II. EVEN IF THERE IS ANY AMBIGUITY, THE RULES OF STATUTORY CONSTRUCTION COMPEL LIMITATION OF RESTITUTION TO THE OFFENSE OF CONVICTION.

A. The Legislative History Unmistakably Shows Congress's Intent to Limit Restitution to the Offense of Conviction.

1. The Original Enactment Evinced No Intent to Expand Restitution Beyond the Offense of Conviction.

The express purpose of the VWPA, as stated in the Act itself, is "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime *without infringing on the constitutional rights of the defendant*." VWPA, P.L. No. 97-291, § 2(b)(2), 96 Stat. 1248 (1982) (emphasis added) (uncodified). It is apparent from the foregoing that Congress, in enacting this remedial legislation, recognized that the restoration of crime victims to a prior state of well-being could not be ordered at the expense of a defendant's traditional constitutional rights. Those rights would include the right to be free from criminal punishment in the absence of an admission or adjudication of guilt, as well as the right to be sentenced on the basis of accurate information. In extending a sentencing court's power to order restitution above and apart from the offense of conviction, the court below gave effect only to the compensatory portion of the statute, *Hughey*, 877 F.2d at 1261 (J.A. 95-96), and ignored those constitutional safeguards which Congress recognized as inherent in criminal proceedings generally.

The principal legislative history of the VWPA is the Senate Report.[7] Discussing Title III—Restitution, the Report quoted the current law of the Federal Probation Act ("FPA"), including the restriction to "loss caused by the offense for which conviction was had." Senate Report at 30. The Report then went on to identify five problems of the then-current law, but neither in the section headed "Problems of Current Law" nor elsewhere in the Report is limitation of restitution to the offense of conviction identified as a problem. Nor is there any indication that Congress meant to achieve a different scope.

The first problem identified in the Report was that under the FPA, a district court could order restitution only as a condition of probation:

> While on probation and among the conditions thereof, the defendant—
>
> . . . .
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. . . .[8]

Thus, there was no statutory basis for an order of restitution if a defendant was sentenced to imprisonment. In keeping with the express language of the statute, courts generally held that restitution ordered as part of a sentence of probation was limited to losses flowing from the

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[7] S. Rep. No. 532, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515-51.

[8] Title 18 U.S.C. § 3651, *repealed*, P.L. 98-473, Title II, c. II, § 212(a)(2), 98 Stat. 1987 (Oct. 12, 1984), as amended by P.L. 99-217, § 4, 99 Stat. 1728 (Dec. 26, 1985), effective November 1, 1987.

offense of conviction. *See, e.g., United States v. Johnson*, 700 F.2d 699, 701 (11th Cir. 1983); *United States v. Black*, 767 F.2d 1334, 1342-44 (9th Cir.), *cert. denied*, 474 U.S. 1022 (1985); *but cf. United States v. McMichael*, 699 F.2d 193, 195 (4th Cir. 1983) (defendant freely admitted the amount of restitution as well as his responsibility for it).

The Report made it abundantly clear that Congress intended by enactment of VWPA to expand the restitution power beyond this limitation to a condition of a probationary sentence. In explaining the provisions of the bill, the Senate Judiciary Committee said:

> *Section 3579(a) expands current law by authorizing an order of restitution independent of a condition of probation*, thereby permitting its use in conjunction with imprisonment, fine, suspended sentence, or other sentence imposed by the court.

Senate Report at 32 (emphasis added). More to the point, the Report nowhere identifies expansion of the restitution authority beyond the offense of conviction as a purpose of the bill, which would certainly be expected if so radical a change had been intended.

2. The 1986 Clarifying Amendment Confirms that Restitution Is Limited to the Offense of Conviction.

The passage of the VWPA prompted a considerable amount of scholarly comment.[9] Much of that comment

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[9] *See, e.g.*, Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 Yale L.J. 505 (1984);

(Continued on following page)

concerned the question of whether Congress had expanded restitution beyond the offense-of-conviction limitation of the old FPA. It was the consensus of the commentators that restitution under the VWPA, as under the FPA, must be limited to the offense of conviction.[10]

These commentaries prompted a clarifying amendment in § 3579(a)(1) itself, which was included in the Criminal Law and Procedure Technical Amendments Act of 1986.[11] The amendment did no more than change one word:

> The court, when sentencing a defendant convicted of an offense . . . may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of ~~the offense~~ *such offense*.[12]

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Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507 (1984); Note, *The Victim and Witness Protection Act of 1982: Who Are the Victims of Which Offenses?*, 20 Val. U.L. Rev. 109 (1985).

[10] Note, Yale L.J., *supra* n.9, at 517 ("an 'offense of conviction' rule is supported—even dictated—by the general policy of the Act that the victims' interests should not be promoted to the detriment of the rights of defendants"); Project, Fordham L. Rev., *supra* n.9, at 516-17 ("The offense limitation of the VWPA, therefore, should be interpreted as a conviction-only offense limitation with the restrictive edge dulled by the plea-bargaining and no-contest exceptions."); Note, Val. U.L. Rev., *supra* n.9, at 142 ("The VWPA should be amended so that it clearly states an 'offense of conviction' standard.")

[11] P.L. 99-646, § 79(a), 100 Stat. 3619 (Nov. 10, 1986).

[12] Title 18 U.S.C. § 3579(a)(1), as amended by P.L. 99-646, § 79(a), 100 Stat. 3619 (Nov. 10, 1986) (deleted language struck through; added language in italics).

The accompanying House Report,[13] however, is most telling—not only as to the meaning of the statue, but as to the correct resolution of Petitioner's case. In the section-by-section analysis, the portion pertinent to this inquiry is the analysis of what was Section 6 of H.R. 2713. There, the Committee on the Judiciary specifically took note of the suggestions in law journals that there might be some ambiguity in whether restitution was limited to the offense of conviction. The Committee rejected these suggestions emphatically, and declared categorically that "offense" meant the "offense of conviction":

> This suggestion is without substance. The term "the offense" in the phrase "victim of the offense," by ordinary rules of sentence construction, refers to the term "offense" in the antecedent phrase in the same sentence, "convicted of an offense." Thus, there is really no ambiguity about the meaning of the term "the offense" in the phrase "victim of the offense." *That term means a victim of the offense for which the defendant has been convicted and is being sentenced*. Nevertheless, a change in phraseology, even though unnecessary because it will not alter the meaning of the provision, can do no harm.
>
> Section 6(a) of H.R. 2713, therefore, substitutes the term "such offense" for the term "the offense" in the phrase "victim of the offense." This change does not alter the meaning of the provision.

House Report at 7 (footnotes omitted) (emphasis added).[14] Moreover, the Committee expressly went on to

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[13] H.R. Rep. No. 334, 99th Cong., 1st Sess. (1985) ("House Report").

[14] The full House Report of eleven pages is reproduced in the Appendix to this brief at A-7–A-29, quoted material at

(Continued on following page)

say that because this change in phraseology did not change the meaning of current law, no delay in effective date was necessary. *Id.*

Regardless of the extent to which this 1985 report is probative as to the meaning of § 3579(a)(1) as originally enacted three years earlier, it is unimpeachable authority for the proper interpretation of the amended version of the restitution statute under which Petitioner was sentenced. The section-by-section analysis of the compromise bill referred specifically to Section 6 of H.R. 2713, for which the report was prepared, as the sole origin of the amendment to § 3579(a)(1), citing specifically to the explanatory page of the House Report quoted above:

> Section 79 of the amendment is identical to Section 6 of H.R. 2713, which was passed by the House on October 29, 1985. See H.R. Rep. No. 334, 99th Cong., 1st Sess. 7 (1985). There are no comparable provisions in H.R. 5241 as reported or S. 1236 as passed.

132 Cong. Rec. H11295 (daily ed. Oct. 17, 1986).[15]

In the case at bar, there is no indication that the court of appeals ever considered the conclusive language from the House Report quoted above. There are few, if any, cases in which the legislative intent is so plainly

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A-21. See also H.R. Rep. No. 1017, 98th Cong., 2d Sess. at 82-83 nn. 42-43 (1984) (substantially identical statement with explanatory examples).

[15] *See generally* Hutchison and Yellen, 1 *Federal Sentencing Law and Practice* 433-435 (1989) (tracing the legislative history of the Criminal Law and Procedure Technical Amendments Act of 1986).

expressed. Because that expressed intent is fully consistent with the language of the statute, Petitioner's right to relief is clear.

B. A Narrow Construction is Mandated Because the Statute is Penal in Nature.

An order of restitution under the VWPA is punishment. It is so denominated in the governing statute: "The court . . . may order, in addition to or in lieu of *any other penalty* authorized by law, that the defendant make restitution . . . ." 18 U.S.C. § 3579(a)(1) (emphasis added). The statute thus contemplated that an order of restitution might be the sole punishment inflicted upon one convicted of an offense.[16] The legislative history confirms that Congress understood the restitution sanction to be penal and intended that it operate as punishment. "Restitution would become a sentence that could, in and of itself, be imposed." 128 Cong. Rec. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum). "S. 2420 would . . . [p]ermit, for the first time, a Federal judge to order restitution as part of the sentence for crimes involving loss of property or personal injury . . . ." 128 Cong.

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[16] The successor statute currently provides that the court may order restitution "in addition to or, *in the case of a misdemeanor,* in lieu of any other penalty authorized by law." 18 U.S.C. § 3663(a), as amended by P.L. 99-646 § 20(a), 100 Stat. 3596 (Nov. 10, 1986) (emphasis added). This was an amendment of the successor statute after its enactment, but before its effective date of November 1, 1987. This amendment does not affect the case at bar.

Rec. S11436 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias). "It provides the remedy of restitution as a sentencing tool for judges . . . ." 128 Cong. Rec. 7431 (daily ed. April 22, 1982) (statement of Sen. Chiles).[17]

The punitive nature of a restitution order has also been recognized by this Court:

> Restitution is an effective rehabilitative penalty . . . . Such a penalty will affect the defendant differently than a traditional fine . . . . Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986) (state restitution order is penal in nature and therefore not subject to discharge in Chapter 7 bankruptcy proceedings). In *Kelly*, this Court endorsed the view of the bankruptcy judge who had noted that "the [restitution] obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." *Id.* at 52, quoting *In Re Pellegrino*, 42 B.R. 129, 133 (Bankr. D.Conn. 1984).

That restitution is penal in nature means not only that the court is limited to the statute, but also that, under the rule of lenity, any ambiguity in the statute must be resolved in Petitioner's favor. *Busic v. United States*, 446 U.S. 398, 407 (1980) (rule of lenity "one of the tools" used to construe an ambiguous penal statute). The rule of lenity applies not only to the substantive ambit of criminal proscriptions, but also to the penalties they impose.

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[17] *See* Project, Fordham L. Rev. at 534 & n.150, *supra* n.9 (collecting floor statements).

Bifulco v. United States, 447 U.S. 381, 387, 400 (1980) (rule of lenity precluded construing drug conspiracy statute to incorporate the special parole term of the target substantive offense).

Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the Congressional purpose is unclear. *Liparota v. United States*, 471 U.S. 419, 427 (1985). As this Court has explained in construing a substantive crime, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *see also McNally v. United States*, 483 U.S. 350, 359-60 (1987) (restrictive interpretation of the mail fraud statute); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985) (restrictive interpretation of the interstate transportation of stolen property statute). "Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971) (Congress must speak "plainly and unmistakably"); *see also Tanner v. United States*, 483 U.S. 107, 131 (1987) (restrictive interpretation of the federal conspiracy statute). Application of the rule of lenity in the context of Petitioner's case compels a holding that would restrict restitution to the amount involved in the offense of conviction.

C. A Narrow Construction Is Also Necessary to Avoid Constitutional Infirmities.

The Fifth Circuit's expansive construction creates constitutional issues in the implementation of restitution

under the VWPA where none need arise. To be sure, statutes should be construed to avoid constitutional questions, and "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575 (1988) (citing cases).

The Congress was fully aware of this danger when it enacted the 1986 clarifying amendment of § 3579(a)(1). The definitive House Report quoted in part II A 2 above (Pet. Br. 23) cited to another Committee Report from the previous year. That earlier report also took note of the question raised in the law journals as to the meaning of the phrase "victim of the offense," and answered that the phrase necessarily referred to the offense of conviction. The House Judiciary Committee's explanation was based upon clear language of the statute, reinforced by the need to avoid obvious constitutional infirmities:

> Any other interpretation would run afoul of the Constitution. Restitution under 18 U.S.C. § 3579 is a criminal penalty. To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law.

H.R. Rep. No. 1017, 98th Cong., 2d Sess., at 83 n.43 (1984).

In order to uphold the district court's restitution order under the unique facts of Petitioner's case, the court of appeals purported to apply the "related acts" and "significiant connection" tests enunciated in *United States v. Berrios*, 869 F.2d 25, 29 (2d Cir. 1989), and *United States v. Duncan*, 870 F.2d 1532, 1536 (10th Cir. 1989), yet it ignored their underlying rationale. In each of these cases, the courts took especial care to base the restitution order upon the defendant's undisputed criminal *conduct* in the first instance. Thus, though *Berrios* and *Duncan* may superficially appear to depart from the more traditional approaches to restitution described in other circuits, each court ultimately required the same sort of reliability in determining the defendant's actual criminal responsibility which the other circuits have found essential.

In this connection, it should be noted that *Berrios* was a split decision on the issue of the degree of restrictiveness of the statutory term "such offense." One judge filed a separate opinion to concur in the result, while sounding a cautionary note as to the implications of the holding:

> In my view, ordering restitution in an amount higher than the amount charged in the information is only proper where the higher amount is attributable to collateral consequences arising out of *the specific offense to which the defendant has pled guilty*. Where there are no such consequences, ordering restitution in the higher amount is an improper expansion of the court's sentencing power.

869 F.2d at 33 (emphasis added) (Meskill, Circuit Judge, concurring). Indeed, the majority opinion seems to rest upon a dual basis. While it enunciated a holding based upon the "related acts" test, the majority also set out in full the conduct of the defendant amounting to waiver, which was the sole basis for the concurring opinion.

Viewed from this perspective, the "significant connection" test enunciated in *Hughey* represents a radical

departure from accepted notions of criminal liability. Indeed, under *Hughey*, all that need be shown in support of a court's restitution order is that the other offenses involved: (1) the same defendant; (2) the same victim; and, (3) the same type of crime. 877 F.2d at 1261 (J.A. 97).

The problem with an order of restitution outside the count of conviction is that it permits a defendant to be held liable for criminal acts without due process of law, as occurred here, where Respondent attempted to establish Petitioner's collateral criminal conduct through hearsay. An order of restitution for collateral offenses also deprives a criminal defendant of his right to trial by jury on alleged criminal conduct.

As restitution is penal in nature, and may be ordered in lieu of any other punishment, it must function in the same manner and to the same extent as any other criminal sanction. Generally speaking, an ordinary criminal sentence is a specific punishment authorized for a specific offense. *See United States v. Henry*, 709 F.2d 298, 310 (5th Cir. 1983) (en banc) (plurality opinion). A criminal sentence may be imposed only after criminal liability has been established. Liability, of course, is established in one of two ways—by proof at trial where the Government has the burden on all of the elements beyond a reasonable doubt—or by a negotiated settlement of the case whereby the defendant expressly and affirmatively relieves the government of its constitutional burden of proof. In no other circumstances may a criminal sentence be imposed.

Likewise, restitution, which under the terms of the statute may be imposed in addition to or in lieu of any "other penalty," must be based in the absence of an

agreement upon a finding of guilt by proof at trial, or by the defendant's decision to expressly and affirmatively relieve the government of its burden. Unlike the *amount* of restitution which may be owed pursuant to a finding of guilt, the determination of criminal responsibility for the losses in the first instance must comport with traditional notions of due process.

In *Hughey*, the court of appeals dispensed with the essential predicate to any restitution order—the unequivocal determination of the defendant's criminal responsibility—when it ordered that he make restitution for all of MBank's losses although, in pleading guilty, Petitioner did not expressly and affirmatively relieve the government of its traditional burden except as to the count of conviction. The court of appeals, moreover, found that Petitioner was criminally responsible for MBank's additional losses by a preponderance of the evidence even though Petitioner never admitted and never agreed as part of the settlement of the case to relieve the government of its obligation to prove his guilt beyond a reasonable doubt.

III. THIS COURT NEED NOT RESOLVE THE SCOPE OF RESTITUTION FOR CONSPIRACIES OR SCHEMES, OR FOR ADMITTED COLLATERAL OFFENSES.

The circuit courts of appeals have found certain narrow exceptions to strict application of the "offense of conviction" limitation in the VWPA.[18] One group of cases

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[18] *See, e.g., United States v. Durham*, 755 F.2d 511, 512-13 (6th Cir. 1985) (the term "victim" is to be read liberally; the

(Continued on following page)

permits an order of restitution outside the offense of conviction where that offense is conspiracy, or has as an element a scheme to defraud.[19] Other cases permit such a restitution order where the defendant either admits, or at least does not dispute, collateral criminal conduct, or agrees to pay restitution for losses flowing from such conduct.[20] None of those exceptions are applicable to the case at bar. Furthermore, some of the decisions were rendered prior to the 1986 clarifying amendment to § 3579(a)(1), and none of the opinions reflect any awareness of the definitive 1985 House Report discussed in part II A 2 above (Pet. Br. 23).

In any event, the court below expressly rejected those limited expansion theories, 877 F.2d at 1262-64 (J.A. 99-105), and we have already shown that its broadly

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term "offense" is to be read narrowly); *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir. 1986) (uninterrupted series of events).

[19] *See United States v. Barnette*, 800 F.2d 1558, 1571-72 (11th Cir. 1986) (conspiracy); *United States v. Pomazi*, 851 F.2d 244, 249 (9th Cir. 1988) (by pleading to a scheme which is an element of the offense, a defendant may be ordered to make restitution for loss caused by entire scheme).

[20] *See United States v. Duncan*, 870 F.2d 1532, 1538 (10th Cir. 1989) (dispute went to the amount of loss, not defendant's responsibility for the loss); *United States v. Berrios*, 869 F.2d 25, 32 (2d Cir. 1989) (defendant acknowledged causing losses outside the count of conviction, as well as his obligation to pay them); *United States v. Kirkland*, 853 F.2d 1243, 1250 (5th Cir. 1988) (agreement to full restitution; no dispute as to type or amount of restitution); *United States v. Paul*, 783 F.2d 84, 87 (7th Cir. 1986) (admission to responsibility for restitution outside the count of conviction).

expansive rule is erroneous. But this Court need not, in this case, resolve the propriety of these narrower exceptions. That is so because none of the exceptions are even arguably applicable to this case. Here, the offense of conviction was the fraudulent use of a single credit card issued to Hershey Godfrey. (J.A. 10) The offense of conviction did not include, as an element, a scheme to defraud; nor was it a conspiracy encompassing other losses.

Moreover, Petitioner expressly disavowed any admission to collateral offenses at all pertinent points in the proceeding. (J.A. 11, 29, 46, 48) Likewise, Petitioner did not consent to an order of restitution in the amount entered. Petitioner suggested a compromise figure of $10,412, representing all losses incurred by MBank arising from misuse of the credit card described in the count of conviction. (J.A. 32, 35, 44, 47) The court declined Petitioner's suggestion and ordered restitution in the amount of $90,431, the sum representing all of MBank's losses resulting from the fraudulent use of a number of its credit cards. (J.A. 41-42, 56, 76) In upholding this order, the court of appeals resorted to an unparalleled extension of the law which represents a radical departure from accepted notions of criminal liability.

CONCLUSION

For the forgoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Title 18, United States Code, Sections 3579 and 3580.

§ 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States in the manner provided for the collection of fines and penalties by section 3565 or by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

(Added Pub.L. 97-291, § 5(a), Oct. 12, 1982, 96 Stat. 1253, and amended Pub.L. 98-596, § 9, Oct. 30, 1984, 98 Stat. 3138; Pub.L. 99-646, §§ 77(a), 78(a), 79(a), Nov. 10, 1986, 100 Stat. 3618, 3619.)

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of

such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal

civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(Added Pub.L. 97-291, § 5(a), Oct. 12, 1982, 96 Stat. 1255.)

99TH CONGRESS) HOUSE OF (REPORT
1st Session) REPRESENTATIVES (99-334

RESTITUTION AMENDMENTS ACT OF 1985

October 28, 1985. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. CONYERS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2713]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2713) to amend title 18, United States Code, to modify certain provisions pertaining to restitution, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Restitution Amendments Act of 1985".

SEC. 2. POWER TO ORDER RESTITUTION IN LIEU OF OTHER SENTENCES.

(a) SECTION 3579 AMENDMENT.--Section 3579(a)(1) of title 18, United States Code, is amended by inserting ", in the case of any misdemeanor or a class E felony," after "in addition to or".

(b) SECTION 3556 AMENDMENT.—Section 3556 of title 18, United States Code, as amended by the Sentencing Reform Act of 1984, is amended by striking out "under this title" and all that follows through the end of such section and inserting in lieu thereof "may order restitution in accordance with sections 3663 and 3664.".

(c) EFFECTIVE DATE.--The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

SEC. 3. STANDARDS FOR IMPOSITION OF RESTITUTION.

(a) IN GENERAL.—Subsection (d) of section 3579 of title 18, United States Code, is amended to read as follows:

"(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the 30th day after the date of the enactment of this Act.

SEC. 4. STATEMENT OF REASONS RELATING TO RESTITUTION.

(a) IN GENERAL.—Section 3553(c) of title 18, United States Code, is amended by inserting "or the court orders only partial restitution," after "restitution,".

(b) CONFORMING AMENDMENT.--Section 3579(a) of title 18, United States Code, is amended—

(1) by striking out "(1)" where it appears after "(a)"; and

(2) by striking out paragraph (2).

(c) EFFECTIVE DATE.--The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

SEC. 5. ENFORCEMENT OF RESTITUTION ORDER.

(a) IN GENERAL.—Subsection (h) of section 3579 of title 18, United States Code, is amended by striking out "or" and inserting in lieu thereof "in the manner provided for the collection of fines and penalties by section 3565 or by".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the 30th day after the date of the enactment of this Act.

SEC. 6. CLARIFYING AMENDMENT.

(a) IN GENERAL.—Section 3579(a)(1) of title 18, United States Code, is amended by striking out "the offense" and inserting in lieu thereof "such offense".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 7. PRESENTENCE PROCEDURE RELATING TO RESTITUTION.

(a) IN GENERAL.—Section 3553(d) of title 18, United States Code, is amended—

(1) by striking out "OR RESTITUTION" in the subsection heading; and

(2) by striking out "or an order of restitution pursuant to section 3556,".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

SEC. 8. NEED FOR RESTITUTION TO BE CONSIDERED AS FACTOR IN SENTENCING.

(a) IN GENERAL.—Section 3553(a) of title 18, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (5);

(2) by striking out the period at the end of paragraph (6) and inserting "; and" in lieu thereof; and

(3) by adding at the end the following new paragraph:

"(7) the need to provide restitution to any victims of the offense.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984.

PURPOSES OF THE LEGISLATION

The purposes of the legislation are (1) to make technical amendments to the restitution provisions of current law and the Comprehensive Crime Control Act, and (2) to specify that restitution to victims is a purpose of sentencing.

BACKGROUND

The provisions of current federal law that authorize restitution as a separate criminal penalty—18 U.S.C. 3579 and 3580 – are rather new, having been signed into law in October 1982 as part of the Victim and Witness Protection Act of 1982.[1] The provisions were uncontroversial—indeed the vote in favor of the Victim and Witness Protection Act was unanimous in both Houses of Congress.[2]

In brief outline, sections 3579 and 3580 create a presumption in favor of restitution. They define the losses for which a convicted defendant can be ordered to make restitution and set forth procedures to be followed by the sentencing court when determining whether to order restitution. If the judge orders less than full restitution, they

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[1] Pub. L. No. 97-291, § 5, 96 Stat. 1253 (1982).

[2] *See* 128 CONG. REC. S-11439 (daily ed. Sept. 14, 1982) (Senate passage); 128 CONG. REC. H-8212 (daily ed. Sept. 30, 1982) (House passage of Senate bill with an amendment); 128 CONG. REC. S-13062 (daily ed. Oct. 1, 1982) (Senate concurs in House amendment with an amendment); 128 CONG. REC. H-8470 (daily ed. Oct. 1, 1982) (House concurs in Senate amendment to House amendment). For a brief synopsis of the legislative history of the Act, see H.R. REP. No. 1017, 98th Cong., 2d Sess. 78 n.11 (1984).

require the judge to state, on the record, the reasons why. The constitutionality of the provisions has been sustained by the six Courts of Appeals that have considered the issue.[3]

The Comprehensive Crime Control Act of 1984 reenacts sections 3579 and 3580, redesignating them as sections 3663 and 3664, respectively.[4] That Act also adds a new provision, section 3556, entitled "Order of restitution," which authorizes a court to order the defendant, "in addition to the sentence that is imposed pursuant to section 3551" (which authorizes imprisonment, fines, and probation), to make restitution to any victim of the offense "in accordance with sections 3663 and 3664."[5]

Rep. Frederick C. Boucher introduced H.R. 2198 to address a number of technical and other minor problems that have become apparent since the enactment of the Comprehensive Crime Control Act, and to make restitution to crime victims a stated purpose of sentencing in the

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[3] United States v. Palma, No. 84-5446 (3d Cir., decided April 16, 1985); United States v. Keith, No. 84-1134 (9th Cir., decided Feb. 12, 1985); United States v. Watchman, 749 F.2d 616 (10th Cir. 1984); United States v. Brown, 744 F.2d 905 (2d Cir. 1984); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984); United States v. Florence, 741 F.2d 1066 (8th Cir. 1984). *See* Note, *The Constitutionality of the Victims' Restitution Provisions of the Victim and Witness Protection Act*, 70 VA. L. REV. 1059 (1984).

[4] Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984). This change takes effect on November 1, 1986. *See id.* at § 235, 98 Stat. 2031 (1984).

[5] *Id.* at § 212(a)(2), 98 Stat. 1991 (1984). This new section takes effect on November 1, 1986. *See id.* at § 235, 98 Stat. 2031 (1984).

new sentencing system enacted by that Act. The Subcommittee on Criminal Justice asked the Department of Justice and the Judicial Conference of the United States for their views on the bill.

In response to this request, Judge Gerald Bard Tjoflat wrote that the Judicial Conference "would have no objections to enactment of this legislation," noting that the Conference had specifically recommended to the Justice Department two of the amendments in the bill. Acting Assistant Attorney General Phillip D. Brady wrote that the Justice Department "perceive[s] no problem" with the bill and "believe[s] that the bill will serve to resolve questions which have arisen during the course of litigation involving the [Victim and Witness Protection] Act."

The Subcommittee on Criminal Justice marked up H.R. 2198 on May 23, adopted one amendment, and ordered the bill as amended reported favorably in the form of a clean bill. H.R. 2713 is that clean bill. This Committee marked up H.R. 2713 on September 10, 1985, and reported it favorably with an amendment (which is explained in the section-by-section analysis).

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 of H.R. 2713 provides that the short title of the legislation is the "Restitution Amendments Act of 1985".

SECTION 2

Section 2 of H.R. 2713 deals with the power of the court to order restitution in lieu of any other criminal penalty. Current law,[6] which is carried forward by the Comprehensive Crime Control Act,[7] authorizes a Federal court to order restitution "in addition to or in lieu of" any other criminal penalty. The Comprehensive Crime Control Act, however, also adds a new provision, which only authorizes restitution "in addition to" another criminal penalty.[8] This new provision is silent about whether restitution may be ordered "in lieu of" other punishment. Thus, when the Sentencing Reform Act (chapter 2 of title II of the Comprehensive Crime Control Act) takes effect, there will be two provision [sic] purporting to define the situations in whch [sic] restitution can be imposed, and the two provisions are not identical.

Section 2(a) of H.R. 2713 as reported by the Subcommittee on Criminal Justice conformed the new provision of the Comprehensive Crime Control Act to current law and permitted a court, for any federal offense, to order restitution in lieu of any other criminal penalty. The Committee, however, considered that restitution alone would not be an appropriate sanction for very serious offenses and therefore amended section 2(a) to permit a court to

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[6] 18 U.S.C. 3579(a)(1).

[7] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1991 (1984) (redesignating 18 U.S.C. 3579(a)(1) as 18 U.S.C. 3663(a)(1)) (takes effect Nov. 1, 1986).

[8] Pub. Law No. 98-473, § 212(a)(2), 98 Stat. 1991 (1984) (enacting 18 U.S.C. 3556) (takes effect Nov. 1. 1986).

order restitution alone only for misdemeanors and felonies punishable by imprisonment for up to two years.

Section 2(b) of the bill provides that the amendment made by section 2(a) takes effect when section 212(a)(2) of the Sentencing Reform Act takes effect (November 1, 1986), since the problem addressed by section 2 will not arise until then.

SECTION 3

Section 3 of H.R. 2713 deals with matters that a court considers when deciding whether (and to what extent) to order restitution. Current law provides that a Federal court "shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process."[9] It could be argued that this provision, by using the term "shall", conflicts with another provision of current law, which provides that the court "may" order restitution.[10]

The origin of the former provision can be traced to the restitution provisions of the criminal code revision legislation. Segments of the business community objected to provisions in that legislation making restitution a

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[9] 18 U.S.C. 3579(d).

[10] 18 U.S.C. 3579(a)(1).

criminal penalty.[11] It was argued, inter alia, that restitution would complicate and prolong sentencing.[12]

The House and Senate Judiciary Committees responded to this concern about conservation of judicial resources by limiting the offenses for which restitution could be imposed and permitting the court to decline to impose restitution if to impose restitution would unduly complicate or prolong sentencing.[13]

This approach was carried forward in the Victim and Witness Protection Act of 1982, but with two modifications that make it more difficult to deny restitution in order to conserve judicial resources. First, the Act made it clear that restitution was not an all or nothing proposition. The sentencing court was empowered to award restitution to the extent that it could do so without unduly complicating or prolonging the sentencing process.[14]

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[11] *See Hearings on Revision of the Federal Criminal Code before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 609, 635-37, 682, 683, 693-99, 716-25, 837-39 (1979) (Business Roundtable); *Hearings on Reform of the Federal Criminal Laws before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 10077, 10091-92 (1979) (Business Roundtable).

[12] *See, e.g., Hearings on Revision of the Federal Criminal Code before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 698 (1978) ("The determination of the amount of the loss may well involve difficult questions of law and fact, which could only be fairly resolved by another full-fledged 'trial'.") (Business Roundtable).

[13] *See* H.R. Rep. No. 1396, 96th Cong., 2d Sess. 456-58 (1980); Sen. Rep. No. 553, 96th Cong., 2d Sess. 952-54 (1980).

[14] Pub. Law No. 97-291, § 5(a), 96 Stat. 1254 (1982) (enacting 18 U.S.C. 3579(d)). *See* 128 Cong. Rec. H-8469 (daily ed. Oct. 1, 1982) (remarks of Rep. Rodino).

Second, since the Act sought to make restitution the "expected norm, and no longer an afterthought,"[15] the sentencing court was directed, when considering conservation of judicial resources, to consider fairness to victims as well.

The use of "shall" in the provision addressing conservation of judicial resources, however, seems inconsistent with the section that provides that restitution "may" be ordered. Section 3(a) of H.R. 2713, therefore, strikes out "shall" and rephrases the conservation of judicial resources provision to require clearly that the need to provide restitution to victims must be weighed against conservation of judicial resources.

Section 3(b) of H.R. 2713 provides that this amendment is to take effect 30 days after the date of enactment of the Restitution Amendments Act of 1985. Because this ambiguity exists in current law, it would serve no useful purpose to delay this change beyond the minimum period of time needed by the bench and bar to become aware of the change.

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[15] 128 Cong. Rec. S-13063 (daily ed. Oct. 1, 1982) (remarks of Sen. Heinz). A Senate sponsor of the legislation, when the Senate was considering the House amendment to the Senate bill, even asserted that "It is the intent of Congress that judges order restitution in each and every case where the court finds there has been property loss or injury to the victim." *Id.* at S-13064 (daily ed. Oct. 1. 1982). While this assertion goes beyond the clear language of the Act (which permits a court to decline to order restitution even though there has been property loss or injury to a victim), the assertion does evidence a strong desire that restitution be the rule and not the exception.

SECTION 4

Current law requires that if a court declines to order restitution, or orders only partial restitution, the court must state, on the record, the reason why.[16] The Sentencing Reform Act carries forward this provision verbatim.[17] That Act, however, also enacts a provision, entitled "Statement of Reasons for Imposing a Sentence", that provides that, "If the sentence does not include an order of restitution, the court shall include in the statement [of reasons for imposing a sentence] the reason therefore."[18]

Because the language of the two provisions is not identical, there may be uncertainty about the obligation of the sentencing court. If a court orders partial restitution, one provision would require the court to state the reason why, but the other provision would not seem to.

Section 4(a) of H.R. 2713 adds language to the provision entitled "Statement of Reasons for Imposing a Sentence" to require the court to state reasons for ordering only partial restitution. Section 4(b) deletes language in the current law provision that is redundant in light of the amendment made by section 4(a). Section 4(c) of H.R. 2713 provides that the changes made by section 4 are to take effect on the date when section 212(a)(2) of the Comprehensive Crime Control Act takes effect (November 1, 1986), since that is when the problem will arise.

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[16] 18 U.S.C. 3579(a)(2).

[17] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579(a)(2) as 18 U.S.C. 3663(a)(2)) (takes effect Nov. 1, 1986).

[18] *Id.* at § 212(a)(2), 98 Stat. 1990 (1984) (enacting 18 U.S.C. 3553(c)) (takes effect Nov. 1, 1986).

SECTION 5

Section 5 of H.R. 2713 deals with enforcement of a restitution order. Current law authorizes the United States Attorney to enforce an order of restitution "in the same manner as a judgment in a civil action."[19] This provision, which is carried forward verbatim by the Sentencing Reform Act,[20] is similar to the current law provision that provides that a judgment imposing the payment of a fine "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases."[21] Thus, current law provides that fines and restitution orders be enforced by federal prosecutors in the same manner.

The Criminal Fine Enforcement Act, which was enacted last Congress, modified the manner in which criminal fines are enforced.[22] Section 5 of H.R. 2713 makes a conforming change in the provision governing the enforcement of restitution orders and authorizes the United States Attorney to enforce a restitution order "in the manner provided for the collection of fines . . . ." This will strengthen the ability of Federal prosecutors to enforce restitution orders.[23]

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[19] 18 U.S.C. 3579(h).

[20] Pub. Law. No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579(h) as 18 U.S.C. 3663(h)) (takes effect Nov. 1, 1986).

[21] 18 U.S.C. 3565.

[22] Pub. Law No. 98-596, § 2, 98 Stat. 3134 (1984). *See* 130 CONG. REC. H-12266-67 (daily ed. Oct. 12, 1984) (remarks of Rep. Boucher).

[23] *See* H.R. REP. No. 906, 98th Cong., 2d Sess. 1 (1984) ("The purposes of the legislation are . . . to encourage the prompt and

(Continued on following page)

Section 5(b) of H.R. 2713 provides that the change made by section 5(a) takes effect 30 days after enactment of the Restitution Amendments Act of 1985. There is no reason to delay the effectiveness of this change beyond the minimum period of time needed by the bench and bar to become aware of the change.

SECTION 6

Current law provides that a Federal court, "when sentencing a defendant convicted of an offense [under title 18 and certain provisions of title 49] may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense."[24] This provision has been carried forward verbatim by the Comprehensive Crime Control Act.[25] It has been suggested that there is some ambiguity in the term "the offense" that appears in the phrase "victim of the offense."[26]

(Continued from previous page)

full payment of fines; and to improve the ability of the Federal Government to collect criminal fines when prompt or full payment is not forthcoming.").

[24] 24 U.S.C. 3579(a)(1).

[25] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579 as 18 U.S.C. 3663) (takes effect Nov. 1, 1986).

[26] *See* Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505 (1984); *Comment, Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 509-17 (1984). *But see* H.R. REP. No. 1017, 98th Cong., 2d Sess. 83, n. 43 (1984).

This suggestion is without substance. The term "the offense" in the phrase "victim of the offense," by ordinary rules of sentence construction, refers to the term "offense" in the antecedent phase in the same sentence, "convicted of an offense."[27] Thus, there is really no ambiguity about the meaning of the term "the offense" in the phrase "victim of the offense." That term means a victim of the offense for which the defendant has been convicted and is being sentenced. Nevertheless, a change in phraseology, even though unnecessary because it will not alter the meaning of the provision, can do no harm.

Section 6(a) of H.R. 2713, therefore, substitutes the term "such offense" for the term "the offense" in the phrase "victim of the offense." This change does not alter the meaning of the provision. Section 6(b) of H.R. 2713 provides that this change takes effect on the date of enactment of the Restitution Amendments Act of 1985. While ordinarily it is advisable to allow a lapse of time between the date of enactment and the effective date in order to enable the bench and bar to become aware of a change in law, no such delay is necessary in this issuance because this change in phraseology does not change the meaning of current law.

SECTION 7

Current law sets forth procedures that must be followed by a Federal court when deciding whether (and to

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[27] *See* H.R. REP. No. 1017, 98th Cong., 2d Sess. 83 n.43 (1984).

what extent) to order restitution.[28] These provisions have been carried forward without change by the Comprehensive Crime Control Act.[29] That Act, however, has another provision, which will take effect on November 1, 1986, that also sets forth procedures governing the issuance of an order of restitution.[30]

Thus, on November 1, 1986, two sets of provisions will describe procedures for issuing an order of restitution. This could result in litigation insofar as there may be discerned any difference between the two sets of provisions. Section 7(a) of H.R. 2713, therefore, amends the provision that will take effect on November 1, 1986, to strike out any reference to restitution. Section 7(b) of H.R. 2713 provides that this change is to take effect when section 212(a)(2) of the Comprehensive Crime Control Act takes effect (November 1, 1986), since that is the effective date of the provision being amended.

SECTION 8

Section 8 deals with the purposes of sentencing. The Comprehensive Crime Control Act enacts, effective November 1, 1986, a provision of title 18 of the United

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[28] 18 U.S.C. 3579, 3580.

[29] Pub. Law No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984) (redesignating 18 U.S.C. 3579 and 3580 as 18 U.S.C. 3663 and 3664 respectively) (takes effect Nov. 1, 1986).

[30] *Id.* at § 212(a)(2), 98 Stat. 1990 (1984) (enacting 18 U.S.C. 3553(d)) (takes effect Nov. 1, 1986).

States Code that will set forth the factors that a sentencing court must consider when imposing sentence.[31] Several factors are listed, such as deterring criminal conduct, protecting the public, promoting respect for the law, and providing just punishment. Restitution to the victims of the offense is not listed.

Section 8(a) of H.R. 2713 amends this provision to require that a Federal judge, when imposing sentence, consider the restitution needs of the victims of the offense. Section 8(b) of H.R. 2713 provides that this change is to take effect when section 212(a)(2) of the Comprehensive Crime Control Act takes effect (November 1, 1986), since that is the date when the provision being amended takes effect.

Oversight Findings

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to this Committee by the Committee on Government Operations.

New Budget Authority

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, H.R. 2713 creates no new budget authority or increased tax expenditures for the Federal Government.

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[31] *Id.* at 98 Stat. 1989-90 (enacting 18 U.S.C. 3553(a)).

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no inflationary impact on prices or costs in the operation of the national economy.

Federal Advisory Committee Act of 1972

The Committee finds that this legislation does not create any new advisory committee within the meaning of the Federal Advisory Committee Act of 1972.

Statement Of The Congressional Budget Office

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 20, 1985.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 2713, the Restitution Amendments Act of 1985, as ordered reported by the House Committee on the Judiciary, September 10, 1985.

This bill amends title 18 of the United States Code, to modify certain provisions pertaining to restitution to victims of crime as part of the sentence imposed on offenders. Based on this review, we expect that no significant impact on the budgets of federal, state or local

governments would result from enactment of this legislation.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Rudolph G. Penner,
Director.

Cost Estimate

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office and estimates that the enactment of this legislation will not result in significant cost to the Federal Government.

Committee Vote

The Committee reported H.R. 2713 on September 10, 1985, by voice vote, a quorum of Members being present.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

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PART II—CRIMINAL PROCEDURE

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CHAPTER 227—SENTENCES

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SUBCHAPTER A—GENERAL PROVISIONS

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§ 3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) * * *

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(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; [and]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.] ; *and*

(7) the need to provide restitution to any victims of the offense.

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(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from the described.

If the sentence does not include an order of restitution, *or the court orders only partial restitution,* the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE [OR RESTITUTION].—Prior to imposing an order of notice pursuant to section 3555, [or an order of restitution pursuant to section 3556,] the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in an open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an o der.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

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§ 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense [under this title, or an offense under section 902(h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.] *may order restitution in accordance with sections 3663 and 3664.*

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CHAPTER 227—SENTENCE, JUDGMENT, AND EXECUTION

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§ 3579. Order of restitution

(a)[(1)] The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, *in the case of any misdemeanor or a class E felony,* in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of [the] *such* offense.

[(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.]

* * * * * * *

[(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the

victim and the imposition of such order will not unduly complicate or prolong the sentencing process.]

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

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(h) An order of restitution may be enforced by the United States [or] *in the manner provided for the collection of fines and penalties by section 3565 or by* a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

* * * * * * *